Dresser-Rand Company *and* IUE-CWA, AFL–CIO, Local 313. Cases 03–CA–026543, 03–CA–026595, 03–CA-026711, and 03–CA–026943

June 26, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On August 6, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 97. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Fifth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale, as explained below. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 97 (2012), which is incorporated here by reference. The judge's recommended Order, as further modified, is set forth in full below.[1]

The Respondent is an international manufacturer of power generation equipment for the oil and gas, chemical, and petrochemical industries. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, AFL–CIO, Local 313 (IUE-CWA) (the Union) represents its employees. On November 23, 2007, after 5 months of unsuccessful negotiations for a new collective-bargaining agreement, and 4 days after the Union ended a 14-week strike and made an unconditional offer to return to work, the Respondent locked out the strikers and employees who had previously crossed the picket line ("crossovers"). On November 29, the Respondent ended the lockout, declared impasse, and implemented the terms and conditions of its last bargaining proposal. The following day, the Respondent discriminatorily recalled the crossovers to work ahead of the strikers. On December 2, the Respondent began recalling strikers to vacant positions using a formula that it unilaterally devised. Thereafter, the Respondent unlawfully refused to recall striker Kelvin Brown, it suspended striker Marion Cook, it unilaterally eliminated paid lunchbreaks on voluntary weekend overtime shifts, and it refused to give certain full-term strikers their accrued vacation benefits. In agreement with the administrative law judge and for the reasons he stated, we find that all of that conduct, and the lockout that preceded it, violated of the Act.

Our colleague agrees with all of those findings with one significant exception: he would find that the lockout was lawful. In his view, the unlawful conduct fails to shed light on the motive for the lockout because the violations occurred after the lockout ended and did not constitute "generalized statements of antiunion sentiment."[2] In determining whether a charged party's conduct is unlawful, the Board examines the context in which the conduct occurred. Especially in cases where motive is at issue, we consider, when contained in the record, the preceding, contemporaneous, and postconduct words and deeds. See, e.g., *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004), enfg. 338 NLRB 1130 (2003) ("[the employer] argues that events occurring after termination are insignificant to determining a company's motivation at the time of the discharge . . . . We disagree.").[3] Although the ultimate question

[1] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with *Don Chavas LLC* d/b/a *Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also substitute a new notice to conform to the modified Order and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[2] Our colleague argues that the General Counsel produced neither a "smoking gun" nor evidence of "general animus" toward the Union or collective bargaining. Neither, however, is necessary to find unlawful motivation. See, e.g., *North Hills Office Services*, 346 NLRB 1099, 1115 (2006) (General Counsel need not present direct evidence of discriminatory intent "such as a smoking gun"; it is enough that the General Counsel prove motive "through circumstantial evidence"); *Overnite Transportation*, 335 NLRB 372, 375 (2001) ("The Board has long recognized that direct evidence of an unlawful motive, i.e., the proverbial smoking gun, is seldom obtainable. Hence, an unlawful motive may be inferred from all of the surrounding circumstances.")

[3] We do not dispute that the facts here are different from those in *SCA Tissue*; we cite the case for the general proposition that after-occurring conduct is sometimes relevant in assessing motive. It is

here is the Respondent's motive at the time it instituted the lockout, its subsequent conduct—in this case, just days later—sheds light on that motive. As stated in the now-vacated decision, the lockout and the Respondent's other unlawful conduct were "all of a piece." The lockout and the other violations that followed were the Respondent's angry reaction to a lengthy but lawful strike that ended with the Union's refusal to accede to the Respondent's bargaining proposals and without a new agreement.[4]

When the strike commenced, there were approximately 417 unit employees, of whom 13 resigned their union membership and returned to work during the strike. One of the crossovers later left the Respondent's employ. When it began recalling employees on November 30, the Respondent not only refused to bargain over recall procedures, but overtly discriminated against 97 percent of the unit by treating the crossovers more favorably than the full-term strikers.[5]

In addition, we note, as did the judge, that the Respondent offered a number of reasons for deciding to lock out the strikers and recall the crossovers before the strikers that do not withstand scrutiny. First, the Respondent asserted that it did not think the Union's offer was "unconditional," an argument the judge properly rejected. Second, Elizabeth Powers, whom the judge found made the lockout decision, testified that she feared that the Union would essentially sabotage the Respondent from the inside if it recalled the strikers—something the judge properly concluded was unsupported by the record. Third, the Respondent asserted that it feared that returning strikers would disrupt production by all using their accrued vacation time as soon as they were recalled, another rationalization that is not supported by the record. Overall, and unlike our colleague, we have no trouble finding that the antiunion animus that underlay the Respondent's discriminatory treatment in recalling the strikers and the Respondent's other postlockout unlawful conduct, e.g., denying the strikers their accrued vacation benefits, also motivated the decision to lock out the employees.[6]

Accordingly, we find that, by instituting the lockout and thereafter continuing to punish its employees for striking, the Respondent violated the Act.

---

ironic that the dissent condemns consideration of after-occurring conduct in examining the Respondent's motive for the lockout, while relying on after-occurring conduct to exonerate the Respondent (i.e., arrival at a collective-bargaining agreement by the time of the 2009 unfair labor practice hearing).

[4] The cases cited by our colleague are distinguishable. In *Sociedad Espanola de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 463 (2004), enfd. 414 F.3d 158 (1st Cir. 2005), the Board found the employer's other violations of the Act insufficient to show that the motive for a defensive lockout was discriminatory. The other violations included an unlawful discharge 2 months before the lockout and a decertification effort soon after the lockout. The Board emphasized that the employer, an acute-care hospital, demonstrated "legitimate operative concerns" that, unless it locked out its employees and continued operations with temporary replacements, it would be unable to find sufficient personnel to weather a threatened strike over the Christmas and New Year's holidays. In short, the case turned on its specific facts, which bear no resemblance to the facts of our case. Here, the nature and timing of the Respondent's other violations support our conclusion they shed light on the motive for the lockout. In *Marlan Lewis, Inc.*, 270 NLRB 432 (1984), the Board found, with only limited discussion, that the February 25 discriminatory recall of laid-off employees failed to establish animus for the extension of a layoff 7 weeks earlier, on January 7. Here, of course, the Respondent's multiple and varied postlockout violations, some of which occurred within days of the lockout and all of which reflect the Respondent's desire to punish the employees for engaging in a strike, present a significantly stronger case of unlawful motive.

[5] Compare *Central Illinois Public Service Co.*, 326 NLRB 928, 934 (1998), review denied sub nom. *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000), in which the Board found that the employer lawfully instituted a 7-week lockout to pressure the union to support its bargaining position and to combat the union's "inside game." The employer also unlawfully suspended health insurance and workers' compensation benefits for a brief period during the lockout. Id. The Board found that the unlawful conduct did not render the lockout unlawful, noting that its effect was minimal, because only 21 employees among 1,500 were initially denied benefits and there was no lapse in benefits coverage or failure to pay claims. Id. at 934–935, 936. Here, in contrast, the Respondent's favorable treatment of crossovers compared to strikers, its failure to bargain with the Union over a recall procedure, and its other postlockout unfair labor practices had an immediate and massive impact on the unit.

Our colleague's statement that crossovers were legitimately allowed to return to work first because they "had some form of standing request" to bring them back to work as soon as the lockout was over is untenable. The Union represents the entire unit, including the crossovers, and the Respondent was not free to recall them while it was bargaining with the Union over recall procedures.

[6] We disagree with our colleague that the Respondent's 8(a)(5) violations are "irrelevant" because they are not "intent-based." Although it is true that the General Counsel need not establish unlawful motive in a refusal to bargain case, it is both self-evident and well established in our jurisprudence that an employer's violations of Sec. 8(a)(5) may, in appropriate circumstances, be evidence of hostility to its employees' bargaining representative. See *U.S. Marine Corp.*, 293 NLRB 669, 670–671 (1989) (successor's refusal to hire certain employees and to bargain), enfd. 944 F.2d 1305 (7th Cir. 1991) (en banc), cert. denied 503 U.S. 936 (1992); see generally *Raven Government Services Corp.*, 331 NLRB 651 (2000) (employer's prior 8(a)(5) conduct tainted its withdrawal of recognition). This is such a case. Here, all of the locked out employees had expressed a desire to return to work. The Respondent's unilateral institution of recall procedures that treated crossovers more favorably supports our finding that the Respondent intended to punish the strikers.

Finally, our colleague cites no authority, and we know of none, to support his suggestion that "the fact that Brown's discharge involved only a single person" tends to preclude the 8(a)(3) violation from demonstrating animus for other violations.

ORDER

The National Labor Relations Board orders that the Respondent, Dresser-Rand Company, Painted Post, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating in regard to hire, tenure, or terms and conditions of employment by giving preferential treatment to employees who cross the Union's picket lines during a strike.

(b) Discouraging membership in the Union by locking out employees who participate in a strike, while not locking out other bargaining unit employees.

(c) Discharging, refusing to recall, or suspending employees because of their union or protected, concerted activities.

(d) Denying accrued vacation benefits to former strikers.

(e) Unilaterally implementing a process for recalling employees from a strike or lockout.

(f) Unilaterally changing its practice of paid lunchbreaks for weekend overtime shifts.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kelvin Brown full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without loss of seniority or any other rights or privileges previously enjoyed, displacing, if necessary, any employee hired to replace him.

(b) Rescind the May 1, 2008 suspension of Marion Cook.

(c) Make Kelvin Brown and Marion Cook whole for any loss of earnings and other benefits suffered by them as a result of Brown's unlawful discharge and Cook's unlawful suspension, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(d) Within 14 days of the date of this Order, remove from its files any references to the discharge of Kelvin Brown and the suspension of Marion Cook and, within 3 days thereafter, notify each of them, in writing, that this has been done, and that the discipline found unlawful will not be used against them in any way.

(e) Make whole, with daily compound interest, all former strikers for any accrued vacation benefits denied them as a result of their participation in the strike.

(f) Make whole, with daily compound interest, all employees who should have been recalled upon the Union's unconditional offer to return to work for any loss of earnings and other benefits suffered by them as a result of the unlawful lockout.

(g) Make whole, with daily compound interest, all employees who would have been recalled from the strike at an earlier date, if it is determined that they would have been so recalled but for the Respondent's unilateral implementation of a recall procedure.

(h) Offer employees who have not been recalled from the strike full and immediate reinstatement to their former positions, without loss of seniority or other rights and privileges previously enjoyed, should it be determined that they would have been recalled but for the Respondent's unilateral implementation of a recall procedure, and make such employees whole, with daily compound interest, for any loss of earnings or benefits suffered by them as a result of the Respondent's failure to recall them.

(i) Compensate all employees to whom backpay is owed for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(j) Upon request, rescind the unilateral change in the practice of paid lunchbreaks during weekend overtime shifts and make whole, with daily compound interest, all affected unit employees for any loss of earnings and other benefits suffered by them as a result of the unilateral change.

(k) Before implementing any changes in terms and conditions of employment, notify and, on request, bargain, with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All production and maintenance employees in the Main Plant of the Respondent's plant in Painted Post, New York; excluding office and clerical employees, time study men, guards, professional employees, nurses, doctors, foremen and supervisors as defined in the Act.

(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board, or its agents, all payroll records and reports, and all such other records, including an electronic copy of such records, if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(m) Within 14 days after service by the Region, post at its facility in Painted Post, New York, copies of the at-

tached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Painted Post, New York facility since November 23, 2007.

(n) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 26, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

I agree with my colleagues' decision in all respects[1] save one: I would reverse the judge and find that the Respondent's lockout was lawful. I agree with the judge that the Respondent demonstrated a legitimate and substantial business justification for locking out employees—the use of economic pressure to induce the Union to agree to its proposals. I also agree with the judge's finding that the Respondent's decision to continue to use permanent replacements hired during the preceding strike, in and of itself, "is not persuasive evidence that the lockout was motivated by illegal purposes."

Like former Member Hayes in dissenting to the prior vacated Board decision, where I part company with the judge and my colleagues is on their reliance on unfair labor practices committed by the Respondent *after* it made the decision to lock out employees as dispositive evidence that the lockout was motivated by antiunion animus.[2] Because a party's intent may change over time, that intent may be different in relation to discrete events occurring while time passes. I agree with majority to the extent they contend that later evidence of intent is not ipso facto irrelevant to the question of intent at an earlier time. But here, the majority draws no real connection between the lockout and the unfair labor practices that it relies upon. One cannot label them "all of a piece" without showing that there is actually a single "piece."

The subsequent unfair labor practices relied upon by the majority fail to shed any light on the Respondent's contemporaneous motive for instituting the lockout, and thus are "far too slim a reed upon which to premise a conclusion that the lockout was unlawfully motivated." *Sociedad Española de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 463 (2004), enfd. 414 F.3d 158 (1st Cir. 2005). It is important to remember that it is the General Counsel's burden to show that the Respondent acted with antiunion motivation *at the time it made the decision to institute the lockout*. In my view, the General Counsel has failed to meet this burden.

The General Counsel has failed to present any evidence to directly support its assertion that the Respondent's decision to lock out employees was unlawfully motivated, nor has he presented circumstantial evidence sufficient to meet his burden of proof for this assertion. In fact, when one examines the most relevant evidence of motivation—the lockout itself—the evidence suggests the contrary. It is undisputed that the Respondent's lockout of employees involved not only those employees who had been on strike but also those "crossover" employees who abandoned the strike, crossed the picket

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing a process for returning the strikers to work, I note that the Respondent failed to establish that exigent circumstances existed that would have necessitated ending the lockout in an expedited manner.

[2] My colleagues note that the judge found insufficient record support for certain reasons given for the lockout, other than the undisputedly legitimate and substantial reason of bringing economic power to bear in support of the Respondent's bargaining demands. The judge did not infer discriminatory intent from these unsupported reasons, either as to the lockout or the recall of crossovers, and neither would I.

line, and returned to work. It is not clear why the inclusion of these crossovers in the lockout should not weigh against a finding that the Respondent's motivation for the lockout was discriminatorily motivated, and neither the judge nor my colleagues appear to consider this in their analysis.[3]

In this regard, several other major problems exist with finding the lockout unlawful. First, as Member Hayes noted in his prior dissent, there was no evidence of general animus towards the Union nor towards collective bargaining. As the judge mentioned:

- "[t]he Respondent and the Union had enjoyed a longterm relationship . . . with many previous collective-bargaining agreements successfully negotiated";
- "the parties engaged in a period of 'early negotiations' in an effort to bargain a successor agreement long before contract expiration";
- there was "*no* allegation that the Respondent's institution of its last offer"—which happened simultaneously with the end of the lockout—"violated the Act" (emphasis added); and
- "during the pendency of [the] proceeding [before the judge], the Union and the Respondent reached agreement on a new contract, which has been ratified, and is now in effect."[4]

In my view, the Board should not infer a general discriminatory motive from this particular pattern of events. Second, in the absence of sufficient circumstantial evidence to meet the General Counsel's burden of proving discriminatory intent, there is nothing close to a "smoking gun" kind of statement made after the lockout occurred that we could use to otherwise find some intent logically and directly relating back to the Respondent's decision to lock out. For example, the lockout decisionmaker, Elizabeth Powers, never made any kind of later comment that she always "had it in" for the Union.

Third, and just as importantly, none of the later events that the majority uses for its analysis has any tangible connection at all with the intent behind the specific decision to lock out. Here, the majority relies on several intent-based unfair labor practices and several non-intent-based ones (i.e., failures to bargain) to make this connection. As Member Hayes pointed out, these particular failure to bargain violations have nothing to do with intent, so they should be irrelevant to our determination of the intent behind the lockout.[5] Indeed, the only such bargaining violation remotely close in time to the decision to lock out is the failure to bargain over the recall. Here, I find it fairly obvious that this violation was caused by the realities of communicating in a high-pressure, high-stakes situation over the telephone, and not from any nefarious purpose.[6]

As to the intent-based violations, most are not even close. Just as Member Hayes pointed out, the one unlawful suspension (Cook) was 5 months after the end of the lockout, and the unlawful vacation deprivation without bargaining was 9 months after. The vacation deprivation issue boiled down to competing, relatively complicated arguments over when the vacation benefit actually accrued under the established terms and conditions of employment, and the judge simply disagreed with Respondent's accrual argument.[7] Cook's suspension—which,

[3] Although the Respondent did later violate the Act by giving preferential treatment to the crossover employees with regard to their recall, this does not change the fact that the Respondent's initial lockout decision—which is at issue here—was a decision that included the crossover employees. See *Marlan Lewis, Inc.*, 270 NLRB 432, 432 (1984).

[4] My colleagues find it ironic that I refer to this later event, based on their mistaken conclusion that I "condemn" consideration of all after-occurring conduct; the reality, of course, is that I am criticizing their reliance on after-occurring conduct that I find to be circumstantially irrelevant. If there is irony here, it is in their failure to accept the notion that later events, if truly relevant to the alleged unlawful conduct, may also be evidence disproving discriminatory intent.

[5] The 8(a)(5) violations at issue here are obviously and markedly different from those in *U.S. Marine Corp*., 293 NLRB 669 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991) (en banc), cert. denied 503 U.S. 936 (1992), and *Raven Government Services Corp.*, 331 NLRB 651 (2000), cited by the majority. In *U.S. Marine*, the violations were part and parcel of a pervasive discriminatory scheme by the successor to avoid bargaining with the union. *Raven* has nothing at all to do with discriminatory intent. It is supportive of the well-established and unrelated doctrine that 8(a)(5) violations, regardless of intent, may taint a subsequent showing of employee disaffection for a union.

[6] However, as noted above, I agree with finding a violation according to the evidence credited by the judge. The Union made a point of demanding to bargain over recall procedures, even though this would logically slow down the recall, which it did. The Respondent needed to then bargain to agreement or impasse, rather than apparently letting its view of the exigencies of the situation and the telephone communications push it into implementation beforehand. As noted above, the Respondent did not carry its burden of proof to show actual exigencies existed requiring a rapid recall of employees that would excuse it from the usual bargaining obligation under *Katz*.

[7] Notably here, the vacation-deprivation unfair labor practice affected only 23 of 417 strikers, which does not present a convincing picture of generalized animus. See ALJD at fns. 9, 55. Moreover, as the judge found, the Respondent consistently applied its position on vacation accrual, albeit a mistaken one, to the strikers, and thus awarded vacation to those who satisfied the Respondent's requirement of 900 hours worked in 12 months: "During the strike, the Respondent granted vacation pay to strikers who requested it, and who had worked 900 hours in the prior 12 months. According to [then-human-resources project manager] Doane's testimony, some strikers who returned in August and September 2008, worked 900 hours subsequently in 2008 and, thus,

again, occurred more than 5 months after the lockout ended—arose from her disparagement of employees who crossed over during the strike. Cook's comments, and the resulting discipline, had nothing to do with the lockout (crossovers were locked out, too). As to employee Brown's discharge, it is an even worse vehicle for imputing unlawful intent to the lockout, besides the fact that Brown's discharge involved only a single person in a 417-person strike and lockout: (1) the judge found that the decision to discharge Brown occurred more than a week after the decision to lock out; (2) the judge found that Respondent had an "honest belief" that Brown engaged in misconduct; (3) the Town Court of Erwin, New York found Brown guilty of disorderly conduct because of the incident; and (4) the judge found an 8(a)(3) violation only because the evidence did not demonstrate that Brown actually had jumped on Respondent's van, but merely and briefly laid across the front of the van.[8]

This leaves the majority reliant upon their contention that Respondent, during the recall, "directly discriminated against 97 per cent of the unit by treating the crossovers more favorably than the full-term strikers." But, this "direct discrimination" cannot reasonably support a finding of discrimination for the lockout. First and foremost, the Respondent did not treat the crossovers more favorably in *its actual lockout,* as noted above. The Respondent locked the crossovers out, just like it did the strikers. These two groups of employees were treated alike. The complete absence of discrimination concerning the decision and implementation of the lockout—the salient event here—far outweighs any supposed "direct discrimination" evinced during the subsequent recall. Second, the discrimination pertaining to the recall originated simply because the individual crossovers unsurprisingly either (a) reacted quickly to Respondent's open letter inviting *all employees* to make an unconditional return to work or (b) had some form of standing request for Respondent to call them as soon as the lockout was over. See ALJD at fn. 34. As the judge found, "[w]hile the letters, faxes, e-mails, and phone calls were being exchanged between the Union and the Respondent on November 29, the crossover employees were returning to work." Thus, the crossovers necessarily showed up for work before the strikers, whose arrival was delayed because of the ensuing bargaining over recall procedures. In that situation, it is hardly shocking that the Respondent put crossovers to work before the strikers and considered them separate and apart from the strike itself. Those circumstances do not show a generalized animus against the Union, but rather a continuation of the sometimes confused dealings between the parties during this labor dispute.[9] Thus, contrary to the judge and my colleagues, I do not agree that the Respondent's unfair labor practices all of which occurred after the Respondent made the decision to lockout employees and after the lockout ended can retroactively establish that the Respondent acted with unlawful motivation at the time of the lockout.

Board precedent supports my view. In *Marlan Lewis, Inc.*, 270 NLRB 432 (1984), the Board reversed the underlying decision finding that the respondent's January extension of a lawful Christmas layoff violated Act, finding that, in the absence of any contemporaneous evidence of union animus, the General Counsel failed to establish a prima facie case of unlawful discrimination at that time. It is important that, in that case, the Board specifically found that the respondent's subsequent conduct of discriminatorily failing to recall laid-off employees on and after February 25 did not establish union animus for respondent's January extension of the layoff.[10] Accord: *Sociedad Española*, 342 NLRB at 462 ("Even in the context of the other violations, we are persuaded that the motivation behind the lockout in this case was operational, not discriminatory."). Thus, *Marlan Lewis*, which involved two separate actions taken by the respondent in

were either allowed to take vacation in 2008 or were paid for the vacation." (ALJD at fn. 55).

[8] I note that my colleagues distort this contextual analysis of Brown's discharge for alleged strike misconduct into a fiction that I would never deem discrimination against a single employee to be evidence supporting an allegation of other discrimination. I also note that the judge sustained employee Owlett's discharge for strike misconduct, additionally demonstrating that the Respondent's disciplinary actions against strikers focused only on perceived misconduct, belying a finding that the Respondent held any animus against strikers who stayed within the bounds of protected activity.

[9] Here, I agree with my colleagues in finding the 8(a)(3) violation resulting from the recall, but only because of the end result that crossovers were *ultimately* treated more preferentially than the strikers, after the parties' recall discussions had concluded. I find that this result derived from the mutual confusion over the Union's earlier "unconditional" return to work, but only under the conditions in the prior labor agreement, and the Respondent's apparent good faith but legally mistaken belief that the crossovers had *already* returned after the lockout was over but before the strike was over. These factors do not provide a defense, in my view, to the recall violation, but they show there was no generalized animus that could relate back to the lockout.

[10] My colleagues discount the holding in *Marlan Lewis*, asserting that the Respondent's subsequent actions here "present a significantly stronger case of unlawful motive." Reasonable minds can disagree on the relative "strength" of the subsequent unlawful discrimination found in *Marlan Lewis* versus the subsequent unlawful discrimination found in the instant case. But, regardless, the holding in *Marlan Lewis* is clear: in determining whether animus was present, the Board focused exclusively on evidence of the respondent's motive *at the time it decided to extend the layoff*, not to evidence of the respondent's subsequent discriminatory actions. Moreover, the Board did not suggest in that case that the respondent's subsequent discriminatory actions were not relevant because they did not constitute sufficiently strong evidence of animus.

the context of the same layoff, undermines the majority's argument that animus should be found here because the Respondent's actions here—involving separate actions in the context of the same work dispute—must be considered "all of a piece."[11]

I further note that the cases relied on by the majority for the proposition that the Board has "often similarly found after-occurring conduct and statements to shed light on motive" are distinguishable insofar as they involved postconduct statements evidencing a strong and generalized antiunion sentiment. See *Postal Service*, 350 NLRB 441, 444 fn. 14 (2007) (finding animus based on postdiscipline threats by supervisor that he was not going to allow employee to go back to the union office again and that he would "dock" the employee for "time . . . spent over at the Union Hall"); *K.W. Electric, Inc.*, 342 NLRB 1231, 1231 fn. 5 (2004) (finding animus based on postlayoff statements that respondent "would close the doors before joining the union," that it was "a non-union company and will be a non-union company," and that if its employees "wanted to be in the Union, they need to go to another company to work"); *Aminco*, 324 NLRB 391 (1997) (telling employee that there were not going to be any reviews at that time "because of all the union bullshit going on"), enfd. mem. 162 F.3d 1150 (3d Cir. 1998); *Lynn's Trucking Co.*, 282 NLRB 1094, 1099 (1987) (finding animus where Respondent informed employees that it was not a union company, and, several days after employee's discharge, sent a memo to all drivers that it was not a union company and did "not choose to be" a union company), enfd. mem. 846 F.2d 72 (4th Cir. 1988). There is no evidence that the Respondent made any similar generalized statements of antiunion sentiment here, and plenty of generalized evidence to the contrary that the Respondent attempted to act in good faith in its relationship with the Union, as noted above.

Because there is no evidence of antiunion animus at the time the Respondent made its decision to implement the lockout, my colleagues err in finding that the lockout was discriminatorily motivated. Therefore, I would reverse the judge and find that this allegation should be dismissed.

Dated, Washington, D.C. June 26, 2015

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminate against you by giving preferential treatment to employees who cross picket lines during a strike.

WE WILL NOT discourage membership in the IUE-CWA, AFL–CIO, Local 313 (the Union), or any other labor organization, by locking out employees who participate in a strike while not locking out other bargaining unit employees.

WE WILL NOT discharge, refuse to recall, or suspend you because of your concerted protected activity or because of your union activity.

WE WILL NOT deny accrued vacation benefits to former strikers.

WE WILL NOT unilaterally implement a recall process for strikes or lockouts without first notifying the Union and affording it an opportunity to bargain about the change and the effects of the change.

WE WILL NOT eliminate paid lunchbreaks on weekend overtime shifts without first notifying the Union and affording it an opportunity to bargain over the change and the effects of the change.

[11] Because the majority here seeks to infer motive based on the Respondent's separate subsequent actions, this case is distinguishable from *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004), upon which my colleagues rely. In that case, the Board found that postdischarge statements *made directly to the discriminatee* could be used to shed light on the respondent's motivation in discharging him. Indeed, the context in that case proves my point. After the discriminatee there had returned to the workplace to pick up his personal effects following his termination, he removed his jacket to reveal a T-shirt, with the words "Work Union" printed on the back in five-inch letters. The supervisor who had originally terminated the discriminatee then demanded that he put his jacket back on, and shortly thereafter made a comment about his "attitude." Accordingly, no inferential leap was required in that case to connect separate actions or different actors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Kelvin Brown full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority, or any other rights or privileges previously enjoyed.

WE WILL rescind the May 1, 2008 suspension of Marion Cook.

WE WILL make Kelvin Brown and Marion Cook whole, with interest, for any loss of earnings and other benefits they may have suffered as a result of the unlawful discrimination against them.

WE WILL, with 14 days from the date of the Board's Order, remove any references to the discharge of Kelvin Brown and the suspension of Marion Cook from our files and, WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct will not be used against them in any way.

WE WILL make whole all former strikers who have been denied vacation benefits that accrued before the 2007 strike.

WE WILL make whole, with daily compound interest, all employees who should have been recalled from the date of the Union's unconditional offer to return to work for any loss of earnings and other benefits suffered by them as a result of the unlawful lockout.

WE WILL make whole, with daily compound interest, for any lost earnings and benefits, all employees who would have been recalled from the strike at an earlier date, if it is determined that they would have been so recalled had we not unilaterally implemented our recall procedure.

WE WILL offer to any employees who have not been recalled from the strike, full and immediate reinstatement to their former positions, or if those jobs no longer exist, to substantially equivalent positions, without loss of seniority or other rights and privileges they previously enjoyed.

WE WILL compensate all employees to whom backpay is owed for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, upon the Union's request, rescind the unilateral change to our practice concerning paid lunchbreaks during weekend overtime shifts, and WE WILL make whole, with daily compound interest, all employees affected by the unilateral change to such practice.

WE WILL notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit before implementing any changes in wages, hours, or other terms and conditions of employment:

> All production and maintenance employees in the Main Plant of our plant in Painted Post, New York; excluding office and clerical employees, time study men, guards, professional employees, nurses, doctors, foremen and supervisors as defined in the Act.

DRESSER-RAND COMPANY

The Board's decision can be found at www.nlrb.gov/case/03–CA–026543 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.